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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1960.

NO. 56

IN RE GEORGE ANASTAPLO,

Petitioner.

(ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.)

BRIEF FOR THE STATE OF ILLINOIS, RESPONDENT.

Certificate of Service.

Appendix.

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BRIEF FOR THE STATE OF ILLINOIS, RESPONDENT.

THE OPINIONS BELOW.

The petition for *certiorari* does not cite under the heading "The Opinions Below" or reproduce as an appendix the first opinion of the Supreme Court of Illinois in this case, *In re Anastaplo*, 3 Ill. 2d 471, 121 N. E. 2d 826, decided September 23, 1954.

Accordingly, that opinion is reproduced in full as Appendix I to this brief.

RESPONDENT'S ACCEPTANCE OF PETITIONER'S STATEMENT OF THE CASE.

In the view of the Attorney General of Illinois, petitioner's Statement of the Case is unnecessarily replete with extensive quotations from the record of petitioner's rather fulsome and oratund expression of his arguments, views and positions and is not the plain and concise narration of facts contemplated by this court's rules and customary in the practice before its bar.

But petitioner's statement is not unfair or inaccurate. Therefore, we accept petitioner's Statement of the Case without corrections or additions.

THE QUESTIONS PRESENTED.

In the view of Illinois' Attorney General, the only questions that it is necessary or appropriate to decide upon the record in this case are:

1. WAS PETITIONER PLAINLY INFORMED AT ALL RELEVANT TIMES BY ILLINOIS' SUPREME COURT THAT HE WOULD BE INELIGIBLE FOR ADMISSION TO THE BAR OF ILLINOIS UNTIL HE MADE DIRECT ANSWERS TO QUESTIONS CONCERNING HIS POSSIBLE MEMBERSHIP IN OR AFFILIATION WITH SUBVERSIVE OR OTHERWISE CRIMINAL ORGANIZATIONS?

2. DOES ILLINOIS DENY PETITIONER DUE PROCESS OF LAW BY REFUSING TO ADMIT HIM TO HER BAR UNTIL SUCH TIME AS HE MAKES DIRECT ANSWER TO SUCH QUESTIONS?

3. DOES THE RECORD SUPPORT AND DID PETITIONER MAKE TIMELY ASSERTION OF HIS CLAIM THAT ILLINOIS HAS DENIED HIM EQUAL PROTECTION OF LAW BECAUSE OF HIS FAILURE TO ANSWER QUESTIONS SUCH AS THOSE INVOLVED IN THIS CASE?

The Attorney General of Illinois contends that the first of the questions stated above should be answered, "Yes, petitioner was plainly informed by Illinois' Supreme Court

that he would be ineligible for admission to the bar of Illinois until he answered questions of the sort involved in this case", that the second of these questions stated above should be answered, "No, Illinois does not deny petitioner due process of law by refusing to admit him to her bar until he answers such questions" and that the third question stated above should be answered, "No, there is no basis in the record for petitioner's present contention that Illinois has denied him equal protection of law, nor did petitioner make timely assertion of that contention in accordance with Illinois principles of practice, which principles are themselves constitutional."

Therefore the Illinois Attorney General submits that only the questions stated above need be answered.

But the arguments of petitioner and of *amici curiae* debate the following questions, which we answer although we do not deem it necessary or appropriate that this Court decide them:

4. MAY ILLINOIS CONSTITUTIONALLY CONDITION PETITIONER'S ADMISSION TO THE BAR OF ILLINOIS UPON HIS ANSWERING QUESTIONS AS TO HIS BELIEFS AND VIEWS ON THE RIGHT OF REVOLUTION SO LONG AS ANSWERS TO THOSE QUESTIONS, IF CANDID, MIGHT REASONABLY AFFORD THE BASIS FOR A REASONABLE INFERENCE AS TO WHETHER PETITIONER WAS CRIMINALLY SEDITIOUS OR OTHERWISE OF A CHARACTER UNFIT FOR THE PRACTICE OF LAW?

5. DOES FEDERAL DUE PROCESS COMPEL A FINDING UPON THE RECORD IN THIS CASE THAT PETITIONER IS A "FIT AND PROPER PERSON" TO PRACTICE LAW AT THE BAR OF ILLINOIS?

SUMMARY OF ARGUMENT.

Petitioner steadfastly declines to answer precisely the sort of questions that if he is admitted to the bar, it will be not only his right but his duty to ask and require prospective jurors to answer in cases involving alleged crimes of sedition should petitioner be called upon, by appointment of court or otherwise, to conduct such cases.

Should a prospective juror refuse (on grounds other than claim of privilege against self-incrimination) to answer such questions and should a court refuse to compel the *venireman* to answer them, both the defendant and the Government would be denied the rudiments of a fair trial by an impartial jury.

Illinois does not deny due process by withholding from petitioner a license to practice law until he answers precisely the kind of questions that it would be his lawyer's duty to compel other persons to answer.

I.

Although this court could say in 1957 in *Konigsberg* v. *State Bar of California*, 353 U. S. 252, that there was doubt as to California's requirement that applicants for admission to her bar must answer questions such as those involved in that case and in this case, there has never been any doubt at any time relevant to this case that petitioner has *actually known* that unless this court otherwise commands, petitioner will not be admitted to Illinois' bar until he answers personally, directly and on his oath or affirmation questions as to his possible membership in or affiliation with subversive organizations. The Supreme Court of Illinois so held in *In Re Anastaplo*, 3 Ill. 2d 471 (1954). By an order

in 1957, set forth in full under Point I of the Argument and reprinted in full, *In Re Anastaplo,* 18 Ill. 2d 182 at p. 186, the present opinion now under review, *In Re Anastaplo,* 18 Ill. 2d 182, the Supreme Court of Illinois has so held.

No amount of proof, however overwhelming, of petitioner's good character will suffice as a substitute for petitioner's personal and direct answers to these questions.

II.

A requirement barring members of the Communist Party, the Silver Shirts or the Ku Klux Klan from the roll of attorneys is constitutional. *Dennis* v. *United States,* 341 U. S. 494.

Illinois punishes with death not only persons actively participating in rebellions against her constabulary but members of a band having, to the knowledge of such members, armed rebellion for an object even though the members did not participate in or help to plot an affray ending in murder. *People* v. *Spies,* 122 Ill. 1, *affirmed, Spies* v. *Illinois,* 123 U. S. 131.

She also punishes concerted libel against racial minorities under a statute (Ill. Rev. Stats., 1959, Ch. 35, par. 47) that this court has held constitution. *Beauharnais* v. *Illinois,* 342 U. S. 809, *affirming People* v. *Illinois,* 408 Ill. 512. The Silver Shirts and the Ku Klux Klan have racial defamation as one of their objects.

Such putative seditious membership or affiliation, if unexplained, being not only a relevant area of inquiry but a ground that if it exists will disqualify petitioner *per se* from the roll of Illinois, attorneys, he has no constitutional "right of privacy" that will permit him at once to refuse to answer the questions involved in this case and to receive a license to practice law. This is true whether answer is refused on the ground of self incrimination, *Lerner* v. *Casey,*

357 U. S. 468, or a claim of constitutional "right of privacy." *Beilan* v. *Board of Education*, 357 U. S. 399. *Uphaus* v. *Wyman*, 360 U. S. 72.

Petitioner's suggestions and the contentions of *amici curiae* that Illinois has greater latitude of inquiry with respect to applicants for public posts than it has with respect to the right to practice law is well conceived in the abstract but is not pertinent to this case. Illinois may certainly forbid certain forms of political activities to employees that it could not forbid to lawyers engaged entirely in private practice.

But Illinois may certainly enforce norms of *loyalty and moral character* of lawyers that are at least as stringent as those that she may impose upon subway conductors, *Lerner* v. *Casey*, 357 U .S. 568, or clerical *personnel*.

Moreover, Illinois may require any lawyer to be eligible, so far as loyalty and character are concerned, for appointment to lawyers' posts in the public service. All employees of the State of Illinois are required to take an oath of loyalty under a State statute that petitioner does not challenge. (Ill. Rev. Stats., 1959, Ch. 127, par. 166(b), Vol. II, p. 1914.)

No member of the Supreme Court of Illinois found that the evidence in the instant case would support an *inference* that petitioner is a member of or affiliated with a subversive organization. Nor does the Attorney General of Illinois suggest that the evidence requires such an inference.

But the record does support an eminently constitutional *presumption* of subversive activity even though every *inference* from the record contradicts that presumption.

Inferences are a belief engendered in the minds of the triers of the facts and arise from evidence.

Presumptions operate in the absence of any evidence or in the absence of a *particular kind* of evidence that may

constitutionally be required even though there is demonstrative evidence of other kinds to refute the presumption.

Until an elector personally swears (or affirms) that he is over twenty-one years of age and has been a resident of his voting district for the requisite period of time, there is a *presumption* (not an inference) that he is not a qualified voter even though the elections officials know the contrary to be the fact. No amount of evidence other than the elector's personal oath (or affirmation) will suffice as a substitute for the personal oath or affirmation of the elector.

Until a litigant personally answers relevant interrogatories there is a *presumption* that his claim or defense is false no matter how much evidence (other than his direct answers to the interrogatories) he offers to produce to prove that his charges or denials of charges are true.

Until an applicant for a marriage license personally swears (or affirms) that he is unmarried, there is a presumption that his contemplated marriage will be bigamous even though there is abundant proof that he is free to marry and no proof to contradict such evidence.

The Argument briefly multiplies other instances, all of unquestioned constitutionality, in which *personal oaths* (or affirmations) of applicants for privileges are required, in the absence of which oaths there is a *presumption* that the applicant is disqualified even though he offers uncontradicted and overwhelming evidence other than his oath of his right to the privileges.

III.

Since petitioner has been refused a license to practice law only until he answers questions concerning his "*mem-*

bership in the Communist Party" and not on account of his refusal to disclose his "beliefs" or "views" as to the right of revolution or upon any other subject, it is certainly unnecessary and we think not appropriate that this court decide the question whether petitioner may constitutionally be required to answer questions as to his possible seditious or otherwise criminal "private belief" or "personal views" as distinguished from his possible overt acts, deeds and conduct constituting or evincing subversive memberships.

But if this question is to be answered at all, it should be answered: "Petitioner may constitutionally be required to disclose beliefs and views, as well as acts and deeds, to the extent that those beliefs and views are necessary ingredients of character and elements of fitness."

The Argument collects numerous examples of "beliefs" and "views" that, even though they are not punishable because they have not culminated in any criminal act, are nevertheless wholly inconsistent with "good character" or, even though morally irreproachable, are not consonant with "fitness". One of such areas of belief is as to the propriety of *present* revolution.

To the extent that petitioner's "beliefs" and "views" are relevant to the issue of character, he may constitutionally be required to divulge them.

IV.

The Argument demonstrates that since there is no case comparable to petitioner's matter in the annals of Illinois, there cannot possibly be any invidious discrimination against him or denial of equal protection.

Petitioner misconceives the impact of "equal protection" insofar as he suggests that Illinois' courts or committees

may not ask any applicant questions of the sort here involved unless it puts such questions to all such applicants.

Petitioner's published utterances on the right of revolution did not and could not constitutionally disqualify him from the practice of law. But they were of such tenor as permissibly prompt questions that are not invariably or even usually addressed to other candidates.

V.

Even though the record may *support* a finding that petitioner is of character and fitness to practice law, as three members of Illinois' Supreme Court and a substantial minority of that Court's Committee say that it does, the record does *not compel* such an inference.

Petitioner has been persistent in his refusal to comply with clearly constitutional requirements for admission to the bar.

Therefore the order now under review should not be set aside.

ARGUMENT.

I.

Petitioner should have known at the time of his first appearance before Illinois' Committee on Character and Fitness, was explicitly told by a unanimous Supreme Court of Illinois on September 23, 1954, and was again informed by that still unanimous court on September 17, 1957, that he would not be eligible under Illinois' law for admission to the State's bar until he answered questions concerning his possible membership in or contacts with subversive or other criminal organizations.

On January 14, 1957, when this court decided *Konigsberg* v. *State Bar of California*, 353 U. S. 252, California's requirement, if such requirement there was, that an applicant for admission to the bar of that State must answer questions concerning his possible connections with subversive groups was so unclear that a majority of this court could say (at p. 260):

> "There is nothing in the California statutes, the California decisions, or even in the Rules of the Bar Committee, which has been called to our attention, that suggests that failure to answer a Bar Examiner's inquiry is, *ipso facto*, a basis for excluding an applicant from the Bar, irrespective of how overwhelming is his showing of good character or loyalty or how flimsy are the suspicions of the Bar Examiners. Serious questions of elemental fairness would be raised if the Committee had excluded Koingsberg simply because he failed to answer questions *without first explicitly warning him that he could be barred for this reason alone*, even though his moral character and loyalty were unimpeachable, *and then giving him a chance to comply*. In our opinion, there is nothing in the record

which indicates that the Committee, in a matter of such grave importance to Koingsberg, applied a *brand new exclusionary rule to his application—all without telling him that it was doing so.*" (Emphasis supplied.)

We confine this Point of our Argument very strictly to demonstrating that, however indefinite California's law may have been in 1957 with respect to any requirement that candidates for admission to her bar answer questions such as those involved in the *Konigsberg* case and in the instant case, **there has never been any uncertainty at any time since petitioner began the study of law that Illinois would not admit members of subversive organizations to her bar,** at least without denial of criminal *scienter* and without explanation of such membership if it existed.

It is virtually certain that petitioner knew before he ever sought admission to Illinois' bar that he would not be eligible for such admission until he answered questions concerning his possible membership in or affiliations with subversive or otherwise criminal groups. It is **absolutely** certain that he **actually knew** the peremptory tenor of this requirement not later than September 23, 1954, the date of the first opinion of the Supreme Court of Illinois in this matter, 3 Ill. 2d 464, and that he was **again** informed of this requirement, not by Illinois' Committee on Character and Fitness, but by a still unanimous State Supreme Court on September 17, 1957.

Under this Point we avoid any discussion of the Federal constitutionality of Illinois' requirement that petitioner answer questions concerning his possible membership in or affiliation with subversive or otherwise criminal organizations. We undertake to vindicate the Federal constitutionality of this requirement under Point II of this Argument, *post.*

Under this point we do no more than note briefly and in chronological order, first the unmistakably clear intimations, then the explicit declarations of Illinois' Supreme Court that candidates for admission to Illinois' bar will not be admitted to practice law in Illinois until they answer such questions or until this court holds that they need not answer them.

The first unmistakably plain utterance of Illinois' relevant requirements became accessible to the public in general and to petitioner in particular on June 11, 1945, when this court decided the case of

In re Summers, 325 U. S. 561.

Summers, who sought admission to the bar of Illinois, had "complied with all prerequisites for admission to the bar of Illinois except that he" had "not obtained the certificate of the Committee on Character and Fitness" required then and now by Illinois' law. (325 U. S. at p. 563.) The "sole ground for refusing to petitioner admission to practice was his profession of conscientious objection to military service". (p. 565.) Petitioner was "honest, moral, and intelligent", he having had "a college and a law school education". (p. 574.)

Summers challenged "the denial of admission from the viewpoint of a religionist." The court's opinion does not make clear but the record in the *Summers* case, available to petitioner in the library of the Chicago Bar Association and at the College of Law of the University of Chicago, reflects the fact that Summers was a member of the Methodist Church and that according to him, the tenets of that church permit although they do not require its members to hold the views of absolute pacifists.

But Article XII, Section 1 of Illinois' Constitution provided then as it still provides:

> "The militia of the state of Illinois shall consist of all able-bodied male persons resident in the state, between the ages of eighteen and forty-five, except such persons as now are, or hereafter may be, exempted by the laws of the United States or of this state." (Constitution of Illinois, Art. § 1, Ill. Rev. Stat. 1959.)
>
> "No person having conscientious scruples against bearing arms shall be compelled to do militia duty *in time of peace: Provided,* such person shall pay an equivalent for such exemption." (Constitution of Illinois, Art. XII, § 6, Ill. Rev. Stat. 1959.)" (Emphasis supplied.)

This court affirmed Illinois' rejection of Summers' application for admission to her bar in the following language (325 U. S. at p. 573):

> "• • • It is impossible for us to conclude that the insistence of Illinois that an officer who is charged with the administration of justice must take an oath to support the Constitution of Illinois and Illinois' interpretation of that oath to require a willingness to perform military service violates the principles of religious freedom which the Fourteenth Amendment secures against state action, when a like interpretation of a similar oath as to the Federal Constitution bars an alien from national citizenship."

Neither petitioner nor any other graduate of a law school that meets Illinois' requirements for legal education could rationally suppose that although Illinois bars those who will not take up arms in time of war *in defense* of the State and Nation, it would admit those whose affiliations would compel them to bear arms *against* Illinois and the United States, not only in times of war, but in times of peace.

The next definitive statement by the Supreme Court of Illinois that applicants for admission to the bar in general and petitioner in particular could not be eligible for admis-

sion to that bar until they should answer such questions as those involved in this case occurred on September 23, 1954, when the Supreme Court of Illinois announced its unanimous decision in

In Re Anastaplo, 3 Ill. 2d 471.

which opinion petitioner does not print as an Appendix either to his petition or to his brief. It is accordingly printed in full as Appendix I to this brief, *post*, p. 37.

From the opinion cited above, *In re Anastaplo*, 3 Ill. (2d) 471, Appendix I, *post*, the following facts appear:

Petitioner, "having successfully passed the Illinois Bar examination" (3 Ill. (2d) 471, at p. 472, App. I, p. 37, *post*), "was advised that he had failed to prove such qualifications as to his character and fitness as, in the opinion of the Committee, would justify his admission to the Bar of Illinois." The court said at page 480:

> "Under any hypothesis, therefore, questions as to membership in the Communist Party or known subversive 'front' organizations were relevant to the inquiry into petitioner's fitness for admission to the bar. **His refusal to answer has prevented the committee from inquiring fully into his general fitness and good citizenship and justifies their refusal to issue a certificate.**" (Emphasis supplied.)

In that opinion, to the entirety of which this court will give attentive consideration, the Supreme Court of Illinois, assisted by briefs on behalf of petitioner and filed by the American Civil Liberties Union and of the National Lawyers Guild as *amici curiae*, reviewed the Committee's denial to petitioner of its Certificate of Fitness.

The court said at (3 Ill. 2d 482):

> "When an applicant, knowing of such condition [that is, conditions requiring petitioner to answer questions

such as those that have been involved in this case since its inception] applies for admission and signifies that he will take the oath of a lawyer, **we think it inconsistent with the privilege he seeks that he should be permitted to defeat pertinent inquiry into his ability to fulfill such conditions by any claim of the right of free speech.**" (Emphasis supplied.)

It was again made plain to petitioner on September 17, 1957, by a still unanimous Supreme Court of Illinois that so far as Illinois law was concerned, he was ineligible for admission to that state's bar until he answered questions concerning such associations. On January 14, 1957, this Court had announced its presently standing opinion in the *Konigsberg* case, 353 U. S. 252. Following that announcement petitioner again sought a Certificate of Character and Fitness from the Committee, which certificate was again refused. On September 25, 1957, he elicited the following order from a still unanimous Supreme Court (reprinted in full text *in re Anastaplo*, 18 Ill. (2d) 182, at p. 186):

"In 1951 the Committee on Character and Fitness for the First Appellate Court District denied the application of George Anastaplo for admission to the bar of Illinois. This Court affirmed the action of the Committee, (*In re Anastaplo*, 3 Ill. 2d 471,) and the Supreme Court of the United States denied *certiorari*. (348 U. S. 946.)

"Subsequently the applicant filed with the Committee a petition for rehearing on the basis of certain decisions of the Supreme Court of the United States. The Committee denied this petition.

"**The principal question presented by the petition for rehearing concerns the significance of the applicant's views as to the overthrow of the government by force** in the light of *Konigsberg* v. *State Bar of California*, 353 U. S. 252, and *Yates* v. *United States*, 1 L. ed. 2d 1356, 77 S. Ct. 1064. Additional questions presented concern the applicant's activities since his original ap-

plication was denied, and his present reputation. (Emphasis supplied.)

> "We are of the opinion that the Committee should have allowed the petition for rehearing and heard evidence on these matters, and the Committee is requested to do so, and to report the evidence and its conclusions."

Petitioner was thus plainly told again by a unanimous court that, in that court's own language, "the significance of the applicant's views as to the overthrow of government by force" required the hearing of "evidence".

We note for the sake of completeness but make no point of the fact, reflected in petitioner's Statement of the Case and in the opinion of which he now seeks review (18 Ill. (2d) 182, petitioner's App. I), that various members of the Committee on Character and Fitness indicated to petitioner that his refusal to answer the Committee's questions would affect his application; for in Illinois, the members of a Bar Association, sitting as Commissioners of the Supreme Court of Illinois, have even less judicial or *quasi* judicial power than have the judges of lower courts or administrative commissions and hearing officers. In Illinois, the recommendations of Commissioners in matters affecting admission to the Bar relating to discipline or concerning disbarment of attorneys, whether as to matters of law or of fact, are only advisory. There is no rule that these recommendations will not be disturbed if they are supported by substantial evidence. The Supreme Court of Illinois makes its own determinations of matters of fact. We make clear the extremely limited *quasi* judicial functions of such Commissioners in the margin.[1]

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[1] The brief of the American Civil Liberties Union, *amicus curiae* in the instant case, suggesting and arguing a question not raised by petitioner, says that this court "fell into error" in the *Summers* case, 325 U. S. 561, by assuming in its opinion in that case that all of the sovereign powers of Illinois are vested in the Supreme Court of Illinois.

The opinion now before this Court, In re Anastaplo, 18 Ill. 2d 182.

In the opinion that is now before this Court for review, 18 Ill. (2d) 182, the Court, quoting with approval from its language in 3 Ill. (2d) at 481, said that petitioner's " **'refusal to answer** [questions as to petitioner's membership in the Communist Party] **has prevented the Committee from inquiring fully into his general fitness and good citizenship and justifies the refusal to issue a certificate.'** We reaffirm our adherence to the foregoing views."

It is clear Illinois will not inscribe petitioner's name on her roll of attorneys until petitioner makes *direct* answers *on his personal oath* to "questions as to membership in the Communist Party or known subversive 'front' organizations". No amount of evidence as to petitioner's character and fitness from sources other than petitioner and no

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This court fell into no error in making this assumption, which is correct.

The general doctrine of tripartite "separation of power" does not apply in Illinois to the matter of admission to or suspension or expulsion from the State's bar.

The Supreme Court of Illinois exercises *all* of the sovereign faculties of Illinois with respect to the rolls of her bar and this is true whether the relevant power is ordinarily denominated "legislative", "executive" or "judicial". It promulgates (actually enacts) the rules governing admission to the bar and hence legislates, its clerk, bar examiners and commissioners perform all administrative functions in connection with admissions and the court makes its own adjudications as to all matters of admission and disbarment. There is no doubt about this. See *In re Day*, 181 Ill. 73.

The general rule that the findings of a lower tribunal will not be disturbed if they are supported by substantial evidence *does not apply to matters affecting the right to practice law.* See *In re McCallum, opinion on rehearing*, 391 Ill. 417, *affirmed* on direct appeal challenging the Rules of the Supreme Court of Illinois prescribing the latitude of the powers of commissioners, 326 U. S. 689 (*per curiam*).

And see *In re Heirich*, 10 Ill. 2d 357, 140 N. E. 2d 825, for an exposition, example and exercise of the court's plenary power to review *de novo* the actions of its Commissioners in a disbarment matter.

amount of testimony from petitioner himself as to his conduct and character take the place of petitioner's *direct* and *personal answers*, under oath or affirmation, to questions put to him as to the existence or lack of existence of subversive memberships and affiliations or beliefs in the past. This is true although the amount of evidence of petitioner's good character *aluinde* and in lieu of such direct answers may be overwhelming and wholly uncontradicted.

II.

Illinois does not deny petitioner due process of law by refusing to admit him to her bar until he answers questions concerning his possible membership in subversive or otherwise criminal organizations.

We confine this Point of our Argument strictly to a demonstration that petitioner's refusal to answer questions as to his possible *membership in or affiliation with* subversive or otherwise criminal organizations is not only reasonable but is in accordance with even the most latitudinarian norms of constitutional freedom that have found utterance in any of this Court's relevant opinions. We defer until Point III of this Argument, *post*, any questions of the Constitutional propriety of inquiring into petitioner's "beliefs" or "views" of a political or any other character insofar as "beliefs" or "views" are distinguished from "memberships" and "affiliations".

To make perfectly clear the carefully limited scope of this Point, we observe that *membership in* or *affiliation with* any organization of any character necessarily involves overt and objective *spoken or written words, acts or conduct.* Membership in or affiliation with any organization can never consist in a purely private and wholly undisclosed state of mind. To become a member of any organization, one must communicate in some fashion with someone.

Hence, although membership in any organization may indeed be secret, that is, clandestine, surreptitious or furtive, it can never be "private", that is wholly undisclosed to anyone. Therefore none of the considerations that we develop under this Point directly relate to any privately held "beliefs" or "views" of petitioner. They relate solely to his possible written, oral or otherwise objective and overt *acts* and *conduct* constituting or evincing possible membership in subversive societies.

Having thus delimited the scope of this Point, we divide it into Sub-Points:

First, the matter of petitioner's possible membership in or affiliation with subversive or otherwise criminal groups was a relevant and therefore constitutionally permissible subject to the Committee's inquiry.

Second, the requirement that petitioner directly answer, in his own words and under oath on affirmation, questions as to such possible membership or affiliation as a prerequisite to admission to the Bar is reasonable and therefore constitutional. We make it plain our contention that due process does not require Illinois to accept any amount of evidence, whether from petitioner or any other person or source, as equivalent to direct and unequivocal answers to the questions to petitioner concerning his possible membership in or affiliation with subversive or otherwise criminal organizations.

A.

Membership in or affiliation with a subversive or otherwise criminal organization, if such membership or affiliation exists, affords a constitutional ground for excluding petitioner from admission to the Bar of Illinois unless that membership or affiliation is explained.

Under this Sub-Point we do not discuss the right of Illinois' Committee on Character and Fitness or her Supreme

Court to require petitioner to answer any questions at all, provided, of course, that if he answers any questions, he is given an opportunity to explain any answers that he may make. Under this Sub-Point we argue merely that unexplained membership in or affiliation with a subversive or otherwise criminal organization is a constitutionally permissible ground for excluding petitioner from membership in the bar of Illinois.

We do this although we do not understand petitioner to debate the point; for this court is not bound by the concessions of the litigants as to matters of law. The briefs of *amici curiae* do seem to argue that even active membership in an organization having an ultimate if not a "clear and present" seditious purpose should not disqualify an applicant for admission to the Bar.

It should and we think that it does suffice to cite to this point this court's decision in *Dennis* v. *United States,* 341 U. S. 495, which holds that membership in the Communist Party with *scienter* of that organization's presently seditious and ultimately treasonable objective is ground for indictment, conviction and imprisonment by the Federal government as a felony against the United States.

But petitioner not only refused to answer questions concerning his membership in the Communist Party. He also refused to answer questions as to his membership in the Silver Shirts and the Ku Klux Klan.

Although the Communist Party does not at the present time profess any policy of racial discrimination, the same cannot be said of the Silver Shirts, a fascist, anti-semitic and anti-Negro organization, or the Ku Klux Klan, an anti-Negro, anti-semitic and anti-catholic political sect.

Illinois punishes the libel of a race under a statute (Ill. Rev. Stats., 1959, Ch. 32, par. 47) that this Court sustains

as constitutional. *Beauharnais* v. *Illinois*, 342 U. S. 809, *affirming People* v. *Beauharnais* v. *Illinois*, 408 Ill. 512.

Moreover, Illinois punishes with death not only those present at and actively participating in a murder committed in a rebellion against an Illinois police force or other constabulary but likewise punishes with death members of an organization who with *scienter* espouse a cause having for its object anarchy or other rebellion and eventuating in such murders. This is true with respect to members of the organization who have no part in, knowledge of or intent as to the actual affray resulting in homicide so long as they knowingly further the band's general objective of criminal violence. *People* v. *Spies*, 122 Ill. 1, *affirmed, Spies* v. *Illinois*, 123 U. S. 131.

The *Spies* case is better known as the *Haymarket riot* case. The execution of some of the defendants in that case has been criticized and Governor Altgeld's act in pardoning other defendants has been justified by many students of the case and its historical perspective. In the views of many historians of the riot, some of the defendants were not guilty of any knowing complicity in the group's objectives and, according to many other students of the case, none of the defendants received a fair trial.

But we are aware of no responsible dissidence, judicial, academic or of any other sort, from the major premise of the decision, that is, that those who knowingly form a band having murder for its object are guilty of murder if murder results from their confederation whether or not they are present at the homicide and even though they do not help to plot the actual slaying that occurs.

Since membership in the Communist Party is a felony against the United States and the fostering of group libels is a misdemeanor under a constitutionally valid enactment

of Illinois, it is clear that membership in the Communist Party, the Silver Shirts, or the Ku Klux Klan utterly disqualified any applicant from membership in the Illinois Bar unless perchance he could convince the Committee that he was an accredited agent of the Department of Justice or some law enforcing agency in Illinois, was writing a thesis on or other exposure of seditious groups or was virgin of knowledge of the band's criminal purpose.

B.

Illinois' requirement that petitioner directly answer questions concerning his membership in subversive or otherwise criminal organizations is reasonable and constitutional. Due process does not require Illinois to accept any quantum of evidence, no matter how overwhelming, of petitioner's character and fitness as a substitute for personal and direct answers to such questions on petitioner's oath or affirmation.

This court has sustained the dismissal of public servants from posts in State governments for refusal to answer questions concerning their membership in the Communist Paty.

This is true whether the refusal is based upon a claim of privilege against self-incrimination, *Lerner* v. *Casey*, 357 U. S. 468, or on a claim of a constitutional right of privacy or of silence. *Beilan* v. *Board of Education*, 357 U. S. 390.

The court has also rejected the claim of constitutional right of privacy or silence in respect to questions concerning possible subversive affiliations in inquiries conducted under Federal auspices in which a witness is entitled not only to the protecton of the due process clause of the Fifteenth Amendment but to the cloak of every other provision of the Bill of Rights. *Barenblatt* v. *United States*, 360 U. S. 109. *Uphaus* v. *Wyman*, 360 U. S. 72.

We understand petitioner to argue and *amici curiae* make clear their contention that a State has more power with respect to dismissal from public service, in which rights of tenure are of statutory origin, than it has with respect to the right to engage in the private practice of a learned profession, which, *once all constitutionally permissible requirements have been met*, is a right that is constitutionally protected. We concede at once that a state may impose *some* conditions upon tenure under Civil Service or even upon public employment without tenure that it could not enforce as a prerequisite to the right privately to practice law or medicine. For instance, a statute or an ordinance may forbid a Civil Service or other public employee to engage in certain types of political activity that it could not forbid the lawyers in private practice. The question is whether the requirement that an applicant for license to practice law answer questions concerning possible subversive memberships is such that it can be constitutionally enforced against incumbents of Civil Service or other public posts but cannot be imposed upon one who aspires to practice law.

The answer must be that the requirement *involved in this case* is one that is equally constitutional, whether it is addressed to public servants or to those who would become lawyers.

In the first place, Illinois certainly has a right to refuse a license to anyone who cannot meet the qualifications, at least as to character and fitness, for such a public office as assistant attorney general, assistant state's attorney or other lawyer's post in the state government. Under Illinois law, no state funds may be disbursed in payment of salary to any state employee who has not taken an oath of loyalty in accordance with the provisions of "An act in relation to the payment of salaries of state officers" (Ill. Rev. Stats.,

1959, C. 127, par. 166 (b), Vol. 2, p. 1914). The full text of that statute is as follows:

> "No employee of the State of Illinois, or any political subdivision, agency or instrumentality thereof, but excluding cities, villages, incorporated towns, townships and counties, shall receive compensation or expenses from any appropriation which has been heretofore made, or which shall hereafter be made until such person has on file with his or her employing authority the following affidavit signed under oath:
>
> United States of America }
> State of Illinois } ss.
>
> I, ..., do swear (or affirm) that I am not a member of nor affiliated with the communist party and that I am not knowingly a member of nor knowingly affiliated with any organization which advocates the overthrow or destruction of the Constitutional form of the government of the United States or of the State of Illinois, by force, violence or other unlawful means.
>
> (signed) .....,
> *Notary Public."*
>
> (Seal)

Petitioner does not challenge the constitutionality of the statute although if it is constitutional or so long as it is unchallenged, it disqualifies him from any post, including any lawyer's post, in the Government of Illinois.

This entire case can be disposed of by answering the question

> **"MAY ILLINOIS REFUSE TO LICENSE AS A LAWYER ONE WHO IS DISQUALIFIED BY LAW FROM HOLDING ANY LAWYER'S POSITIONS OR OTHER PUBLIC POST IN THE STATE GOVERNMENT?"**

Surely due process is not denied by requiring that anyone admitted to practice law in Illinois be qualified, at least as to character and fitness, for a lawyer's position in the public service!

Suppose, however, that we answer the question by responding

> "NO, EVEN THOUGH PETITIONER'S ADMISSION TO THE ILLINOIS BAR WILL NOT QUALIFY HIM FOR A LAWYER'S OR OTHER POSITION IN ILLINOIS STATE GOVERNMENT UNTIL HE TAKES ILLINOIS' OATH OF LOYALTY, IT IS STILL NECESSARY TO DETERMINE WHETHER DUE PROCESS GUARANTEES PETITIONER THE RIGHT TO A LICENSE THAT WILL ALLOW HIM TO ENGAGE IN PRIVATE PRACTICE SO LONG AS PETITIONER DOES NOT ACCEPT STATE EMPLOYMENT IN ILLINOIS."

Surely Illinois may require any applicant for admission to the bar to answer any question that New York may ask a subway conductor (*Lerner* v. *Casey*, 357 U. S. 468) or Pennsylvania may ask of a teacher in the public schools (*Beilan* v. *Board of Education*, 357 U. S. 399)!

Petitioner, the *amici curiae* and the Attorney General of Illinois all strongly emphasize the fact that no member of the Supreme Court of Illinois drew any inference from this record that Petitioner was, in fact, a member of any subversive or otherwise criminal organization.

But even though the record does not support an *inference* of petitioner's putative membership in an organization having treason for its object, it does justify an eminently constitutional *presumption* that petitioner is committed to such a band, which presumption need not yield to any amount of evidence, even though the evidence is overwhelming and uncontradicted, except petitioner's personal and direct answer to the questions involved under this Point.

The tenor of plaintiff's arguments and those of the *amici curiae* make it necessary to recall that *presumptions* have always been very different from and in one respect are quite the opposite of *inferences*.

A true *inference*, properly so called, is an actual *belief* engendered in the mind of a trier of questions of fact, *which belief arises from evidence*. But a true *presumption*, prop-

erly so called, has nothing to do with the actual belief of the trier of facts but directs decision either in the absence of any evidence or, even though there is abundant evidence, in the absence of a *particular kind of evidence* that constitutionally may be required and by law is required.

Let us exemplify and illustrate this most important point:

Suppose that a newspaper of national circulation should publish a statement charging that petitioner was a member of the Communist Party and was unfit to practice law in Illinois. Suppose that petitioner should sue this newspaper for libel. Suppose that the newspaper were to address a written interrogatory or orally propound on a deposition for discovery to petitioner the question "Are you or have you ever been a member of the Communist Party?"

Suppose that petitioner were to decline to answer this interrogatory "Yes" or "No" but were to offer to produce many character witnesses whose testimony would support an *inference* (*not* a presumption operative in the absence of evidence) that petitioner was not a Communist.

The proffer or even the production of such testimony would not suffice as a substitute for personal answer to the direct question.

Unless petitioner should answer this interrogatory specifically, in his own words and upon his own oath or affirmation, or unless he declined to answer it *on the specific ground that a truthful answer would tend to incriminate him*, any court would, at the very least, dismiss his complaint with prejudice for failure to answer directly, upon oath or affirmation and in terms of his personal knowledge a question that was not only relevant to but *of the very essence of* his case, that is, a question as to the truth or falsity of the allegedly defamatory publication, just as petitioner's possible membership in the Communist Party is *of the very essence* of his application for the right to practice law.

Presumptions, which, unlike true inferences, arise, not from an actual belief generated by a consideration of the evidence, but from a rule of law that is operative in the *absence* of the kind of evidence that may constitutionally be demanded and is by law required, *never* depend on the actual facts or on anyone's belief as to the facts of the particular case. Presumptions give effect to rules of law made for the ordinary governance of society. They are effective without regard to the actual merits of the particular case in which they are applied.

Although a court might "presume" petitioner to be a seditious character for the purposes of deciding a suit by petitioner for libel until petitioner should answer the direct question "Are you or have you ever been a Communist?", it would indulge precisely the opposite of that presumption were petitioner not a plaintiff in a libel case but a defendant in a case charging him with felonious membership in the Communist Party. In that case, petitioner would not have to take the stand at all nor would he even have to invoke the privilege of his incrimination. If no evidence was produced tending to show he was a Communist, he would be entitled to a directed verdict of "not guilty" even though the judge and jury believed or knew that he was plotting treason. He would be entitled to a "presumption" of innocence even though the judge and jury might gravely suspect him of guilt or know that he was guilty.

Similarly, when the automobiles of two drivers, Driver First and Driver Second, collide under such circumstances that the accident must have been the fault of one of them and each driver brings a suit against the other driver, if neither driver will answer any interrogatories as to how the accident occurred, in the case of Driver First the judge will "presume" that the accident was his fault and dismiss the suit brought by Driver First. But in the case brought by Driver Second, in which Driver Second has the burden of

proof, the same judge will "presume" that the accident was the fault of Driver Second and dismiss his suit.

This would be true in each case, even though an opposite judgment were reached in each case and even though each driver offered the testimony of many eye witnesses as to how the accident occurred so long as neither driver would personally answer, directly and categorically, under his personal oath or affirmation interrogatories directed to the issue on which he had the burden of proof.

The point is so important that we pursue it a little further.

Where a defendant is charged with bigamy, even though the defendant is shown to have successively married each of two women, there can be no finding of bigamy unless there is a further showing that his first wife was alive and that he was undivorced from her at the time that he went through a marriage ceremony with his second wife. The presumption of innocence of felony is stronger than is the usual presumption that a marriage, once shown to have been created and not shown to have been dissolved, still subsists.

But there is nothing unconstitutional about requiring an applicant for a marriage license to declare under his own personal oath either that he has never been previously married or, if he has been previously married, that his first spouse has died or there has been a divorce. Any state may refuse to issue such a license until the applicant gives his answers *on his personal oath or affirmation* to questions as to his marital status at the time he seeks a marriage license. It will not do for the applicant for such a license to refuse to answer the question personally but offer to bring a host of witnesses who will depose that he is not the sort of person who would be likely to commit bigamy.

Perhaps the most frequently enforced presumption, or, if one prefers the phrase, rule of substantive law expressed in

the form of a presumption, occurs in the case of the probate of wills. Nearly all states require that wills be "proved" by the testimony of two (or in some states three) subscribing witnesses or proof of the genuineness of their signatures. Until *this particular kind* of evidence is offered, there is a *"presumption"* that the signature is not genuine or, if genuine, that the testator was not of sound mind when he wrote it. Moreover, most states require proof that these subscribing witnesses shall have signed the will in the presence of the testator and that he shall have signed the instrument in the presence of each of them. No amount of evidence that the testator's signature is genuine, that he was of sound mind and free from undue influence will admit the will to probate if this requirement is not met.

It makes no difference whether in *petitioner's individual case*, a majority of the Committee and a majority of the members of Illinois' Supreme Court could find after months of very tedious attention to petitioner and his procession of witnesses, summoned from busy walks of life, that petitioner was of blameless character when a few words from petitioner, if truthful, would have disposed of this matter in 1951. Illinois' rule may be fashioned with a view to avoiding vast waste of time that can be saved by simple answers to direct questions. She need not impose upon her commissioner and highest court the need of compiling and reviewing a record of the dimensions of petitioner's transcript every time a candidate for the bar chooses not to answer simple and relevant questions.

III.

There is no basis for petitioner's assertion that he has been denied equal protection of the law.

Petitioner points to no case in the annals of Illinois in which any applicant other than petitioner himself has ever declined to answer *any* question *of any* kind for any reason.

and has nevertheless been admitted to the bar of Illinois. If the Attorney General of Illinois or those of his staff who are writing this brief knew of any such case, it would be their duty to inform this court of its existence. They know of no such case.

If petitioner means to suggest that the Committee on Character and Fitness must ask every applicant questions as to his possible memberships in and affiliations with subversive groups or may ask none of them any such questions, his argument seriously misconceives the Committee's functions and gravely misprises the import of equal protection.

Petitioner had admittedly written some prose that could not possibly disqualify him *ipso facto* from any right or privilege to which he was otherwise entitled but that did awaken a most natural inquiry as to what he meant by it.

He thereupon assumed the intransigent stance that he has maintained for nearly ten year and has refused to answer perfectly proper questions for that period of time.

He is neither to be debarred nor disbarred from the office of attorney because he has expressed constitutionally permissible beliefs in a style of rhetoric that is somewhat perfervid but quite obscure.*

The Committee need not have enough reason to exclude an applicant from the bar before it may ever venture a question that it does not invariably or even usually put to other candidates.

Petitioner has made no showing of any invidious discrimination either against any class of which he was a member or against him as an individual.

There is no basis for petitioner's claim that he has been denied equal protection of the law.

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* Petitioner's essays are not seditious merely because they are dull and very poorly written. But because petitioner does not write well, his writings are unclear and thus evoke inquiry as to their meaning.

IV.

The court need not answer the question whether petitioner may constitutionally be asked questions about his private "beliefs" or "views" as distinguished from his acts and conducts. But if the question is to be answered at all, it should be answered that Illinois may ask such questions.

This court has said that belief is "in its nature absolute."

But all statements, certainly all juridical utterances, must be restrained by their contexts.

It is true that mere subjective beliefs, never manifested overtly, cannot constitutionally be punished.

But it is not quite true that "beliefs" and "views" are always and necessarily without legal consequences so long as they do not culminate in antisocial conduct.

We exemplify:

One who believes, whether from religious prepossessions or otherwise, that surgery should never be practiced is not only unqualified for a license as a surgeon. He may constitutionally be refused a license to practice medicine without surgery; for doctors of medicine must, according to accepted professional and legal standards that are perfectly constitutional, recommend operations under some circumstances even though they lack the skill or the will to perform them.

There is a sect of several hundred persons living in and largely governing a small town near Chicago called Zion, Illinois, whose faith impels them to believe that the earth, except for hills and declivities, is a flat disk and not an approximate but not quite perfect sphere, as most of us think that it is. No one suggests that these persons can be fined or imprisoned for their pertinacity in maintaining this

view. But none of them is qualified for a license as a maritime or aeronautical navigator, or, for that matter, to teach geography.

Citizenship is denied to those who *believe* in polygamy whether they practice it or not. And this court said in the *Summers* case that Illinois might bar Summers from the practice of law because a

> "like interpretation of a similar oath as to the Federal Constitution bars an alien from citizenship." (325 U. S. at p. 573.)

One who believes in treason, mass murder, genocide or other horrors that menace civilization is not the sort of person whom Illinois must admit to her bar even though he has not yet begun to put these beliefs into practice.

If, as we submit is true, Illinois may exclude petitioner from her bar if he holds arrantly dangerous or treasonable beliefs, she may certainly ask him whether in fact he holds these beliefs; for he and he alone really knows the answer to that question.

V.

The record does not compel the conclusion that petitioner is a fit person to practice law.

We are firm in our insistence that, once it is perceived that petitioner has certainly known since at least 1954 that Illinois required him to give direct answers under oath to questions as to his possible membership in subversive organizations so that no "brand new exclusionary rule" has been applied against him, the only question before this court is: "Is this requirement constitutionally applied to petitioner?"

If the rule is clearly constitutional, as we submit that it is (see Point II, *ante*), then no question as to petitioner's fitness to practice law in Illinois is before this court.

But petitioner and both *amici curiae* argue the question of petitioner's fitness for the bar as though that question were justiciable in this case and as though, if justiciable, it requires an affirmative answer.

Lest the Attorney's General failure to answer this question be deemed an acquiescence in petitioner's and the *amici's* contentions, he make the following brief observations.

A minority of the Commissioners and three members of the Supreme Court of Illinois found petitioner to be a proper person to practice law in Illinois.

A majority of the Commissioners and of the court did not so find.

The question of petitioner's fitness, if that question is presented at all, is this:

> EVEN THOUGH THE RECORD MAY *PERMIT* A FINDING OF PETITIONER'S FITNESS TO PRACTICE LAW, DOES THE EVIDENCE SO IMPERIOUSLY *COMPEL* SUCH A FINDING AS TO RENDER THE CONTRARY DECLARATION OF A MAJORITY OF ILLINOIS' SUPREME COURT A DENIAL OF DUE PROCESS?

The Attorney General of Illinois submits that the question stated above must be answered in the negative.

The purview of the office of the committee that recommended (it had no power authoritatively to find) that petitioner be deemed unfit for the practice of law is connoted if not, indeed, denoted, by its title, which is *not* "The Committee on Character" but "The Committee on Character *and Fitness.*"

Petitioner, apprised of Illinois' requirement that he answer questions of the sort involved in this case, knowing that Illinois bars those from the practice of law whose

scruples prevent them from bearing arms in her defense, did not content himself with a simple statement of his position but volunteered *ex gratia,* although no one asked him, that as a lawyer he could not advise a client to defy a judgment of an Illinois court by violence, but nevertheless, as a friend or private citizen he must give such advice. He did not delimit the circumstance that might impel or dispose him to advise violence as a justifiable means of avoiding the effect of the orders of courts of whom he hopes to be officers.

Petitioner does not even yet give a sensible reason why he will not answer the questions involved in this case. He does not say that the answers will incriminate him. He knows that answers to questions such as those involved in this case, as to actions if not as to belief, can be required of him by any grand jury, by any Federal, State or municipal legislative committee the scope of whose investigation renders the questions relevant and by any civil service board or State official with authority to appoint him to any post that he may seek.

He therefore knows that there is no constitutional mantle that invariably insulates him or any other citizen from these questions.

He knows that if he becomes a lawyer and if his interest in cases involving freedom of conscience should lead him to defend an allegedly subversive person, he would have a duty to ask *every prospective juror in the case* whether the *venireman* had ever been a member of the Communist Party, whether he believed in the overthrow of the government by violence and whether he had any religious scruples that would prevent him from serving as a juror or taking a juror's oath.

Furthermore he could insist on an answer to these questions or his client would be denied the rudiments of a trial by jury.

The Attorney General of Illinois submits that when a majority of that State's highest court refuse to make a lawyer of a man who will not answer the very kind of questions that it will be his duty to compel prospective jurors, witnesses and other persons to answer, that court's action does not deny due process of law.

Conclusion.

For the reasons set forth in this brief, it is submitted that the order of the Supreme Court of Illinois now under review should be affirmed if a plenary consideration of this case does not convince the court that *certiorari* was improvidently granted.

Once this court has granted *certiorari*, the Attorney General of Illinois does not ordinarily suggest that it reconsider its action. He addresses the case on the merits, as he addresses this case.

But ordinarily, the Attorney General has either answered the petition for *certiorari* or has had an opportunity to do so.

In this case, however, the Attorney General had no such opportunity; for petitioner did not observe the usual practice of serving any copy of his petition or notice of its filing upon the Attorney General although the Attorney General is the only counsel who represents or can represent Illinois in this court.

Petitioner did serve the Chicago Bar Association or its counsel with a copy of his petition. They did not transmit it to the Attorney General, presumably because they could not reasonably suppose that petitioner would not serve the State's only counsel in a case against the State. But the commissioners, like masters and referees, are advisors to the court, not adversary litigants or opposing advocates.

Petitioner must know that it is always the Attorney General, never the Chicago Bar Association, that represents Illinois in this court. *Cf. In re Summers*, 325 U. S. 561, in which it was the Attorney General of Illinois, not counsel for the Chicago Bar Association, who represented Illinois.

The late Grenville Beardsley, Attorney General of Illinois when this petition was filed, and the staff of his appeals division had no intelligence from any source that this petition had been filed until the day that it was granted and they received this court's telegram to that effect.

The court needs no protection from groundless petitions for *certiorari when the petitions fairly disclose the essence of the case sought to be presented* and *when respondents have an opportunity to respond to the petitions*. The instant petition, however, made no such disclosure, as must now appear, nor did the Attorney General of Illinois have an opportunity to answer it.

Therefore we suggest alternatively that this court affirm the order now before it or dissolve as improvided its action in granting its writ of certiorari.

Respectfully submitted,

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APPENDIX I.

In Re Anastaplo, 3 Ill. 2d 471.

Mr. JUSTICE DAILY delivered the opinion of the court:

"George Anastaplo, to whom we shall refer as petitioner, having successfully passed the Illinois bar examination, filed with the Committee on Character and Fitness for the First Appellate Court District, an application for admission to practice before the courts of this State, together with affidavits as to his good moral character and general fitness to practice law, as required by section IX of Rule 58 of this court. (Ill. Rev. Stat. 1951, chap. 110, par. 259.58.) Subsequently, and as further ordained by the rule, he appeared before a two-man section of the committee and before the entire committee for the purpose of furnishing evidence of his moral character and good citizenship. Ultimately, on June 5, 1951, petitioner was advised that he had failed to prove such qualifications as to character and general fitness as, in the opinion of the committee, would justify his admission to the bar of Illinois. Petitioner did not seek a rehearing, as was his right, and while the committee has continued to refuse to issue him a certificate of character, it has held itself open to further suggestions and arguments of petitioner, presented through the media of letters and one further appearance of petitioner before the committee.

Petitioner has now filed in this court what is termed a 'Petition and appeal from the refusal of the Committee on Character and Fitness * * * to sign a favorable certificate for admission to the practice of law for the Applicant and Motion to the Supreme Court of Illinois to provide for the admission of the Applicant to the practice of law in the state of Illinois.' Although we have held that the discretion exercised by the committee on character and fitness will not ordinarily be reviewed, (*In re Frank*, 293 Ill. 263), and it is well established that a petition for admission to the bar, though a judicial function, is an administrative act rather than

a judicial proceeding, (*In re Summers*, 325 U. S. 561, 89 L. ed. 1795,) it is our opinion, in the light of petitioner's claims that the committee abused its discretion and that certain of his constitutional rights were infringed upon, there exist circumstances which should cause us to set the matter down for argument and opinion. (*In re Summers*, 325 U. S. 561, 89 L. ed. 1795; *Brooks* v. *Laws*, 208 Fed. 2d 18.) Accordingly, petitioner has filed a brief and argument, we have granted leave to the American Civil Liberties Union and to the National Lawyers Guild, as *amici curiae*, to file briefs in petitioner's behalf and have permitted Stephen Love, a Chicago attorney and one-time committee member who apparently did not concur in its action, to file his suggestion in the cause.

Looking to the record, to the committee report to this court, and to petitioner's brief, we find that the crux of the controversy is centered upon petitioner's refusal to answer as to whether he was a member of the Communist Party or of any of the subversive organizations on the list compiled by the United States Department of Justice. When first asked if he was a member of the Communist Party petitioner responded that the question was an inquiry into his political beliefs and an "illegitimate question." Similar responses to similar questions appear in other portions of the record of petitioner's examination and at no time did he answer the question. Predicated upon these refusals, the committee, on the basis of their opinion that a member of the Communist Party, because of such membership, might not be able in good faith to take the oath of lawyer to support the constitution of the United States and the constitution of the State of Illinois, then directed questions to petitioner designed to elicit his views in what the committee felt were pertinent areas of inquiry. Briefly summarized, as the result of the committee's questioning, petitioner expressed his opinion that a member of the Communist Party, otherwise qualified, should be admitted to the practice of law and that he could see nothing contradictory or incompatible between adherence to the tenets of that party and the taking of the oath to support the constitutions. Likewise, at this time, he expressed his belief in the doctrine

of revolution and the overthrow of government by force of arms, saying that he would embrace such doctrine if he could not agree with the existing government, or found it unsatisfactory, and felt that force of arms was the only means to attain the end desired. He stated that such view would not be altered even though the existing government provided for peaceful and orderly means of change. In its report, the committee states that the views and opinions expressed by petitioner on these matters were not the basis for the denial of a certificate, but that the committee agreed such views increased the importance of petitioner's refusals to answer and made more necessary a complete answer on the subject of membership in the Communist Party, so that the committee could better determine the ability of petitioner to take the oath of attorney in good conscience and his good citizenship.

Petitioner presently contends that the committee abused its discretion and exceeded its function by inquiring into his political views, directly and indirectly, and charges that its action in denying him a certificate stems from hostility and differences of personal opinion rather than from considerations of his lack of moral character or general fitness to practice law. At the outset of our consideration of this point, we wish to say that we find nothing in the record to substantiate petitioner's conclusion that the committee was hostile to him or that its decision was motivated by personal opinions differing from his own. What does appear clearly is that the denial was based upon the doubts as to his ability to take the oath of lawyer in good conscience created by his refusal to answer whether he was a member of the Communist Party or other known subversive "front" organizations for that party. Thus our first consideration must be directed to whether petitioner's membership or nonmembership in the party was a relevant field of inquiry or whether the committee abused its discretion and exceeded its function.

In this jurisdiction it is firmly established that the power to regulate and define the practice of law is a prerogative of the judicial department, as one of the three divisions of the government created by article III

of our constitution, an inherent adjunct of which is to prescribe regulations for the study of law and the admission of applicants for the practice of the profession. (*In re Day*, 181 Ill. 73; *People ex rel. Illinois Bar Assn.* v. *Peoples Stock Yards State Bank*, 344 Ill. 462; *People ex rel. Chicago Bar Assn.* v. *Goodman*. 366 Ill. 346.) A concomitant principle, established by the decisions of this court, is that the right to practice law is a privilege, and a license for that purpose makes the holder an officer of the court, and confers upon him the right to appear for litigants, to argue cases and collect fees therefor, and creates certain exemptions, such as from jury service and arrest on civil process while attending court. (*In re Day*, 181 Ill. 73, 80.) In the exercise of its judicial power over the bar, and in discharge of its responsibility for the choice of personnel who will compose that bar, this court has adopted Rule 58, (Ill. Rev. Stat. 1951, chap. 110, par. 259.58,) which governs admissions and provides, among other things, that applicants shall be admitted to the practice of law by this court after satisfactory examination by the Board of Examiners and certification of approval by a Committee on Character and Fitness. Section IX of the rule provides for the creation of such committees and imposes upon them the duty to examine applicants who appear before them for moral character, general fitness to practice law and good citizenship. Still another condition precedent to admission to practice law in this State, imposed by the legislature, is the taking of an oath to support the constitution of the United States and the constitution of the State of Illinois. (Ill. Rev. Stat. 1951, chap. 13, par. 4.) We think the conclusion inescapable that the inquiry of the committee must be directed, in part, to the ability of an applicant to take the required oath in good conscience. Such an oath requires loyalty to our government, as does any concept of good citizenship, thus inquiry aimed at determining the loyalty of an applicant, must be deemed to be relevant to a determination of the conditions for admittance fixed both by the statute and by the rule of this court.

In the case of *Dennis* v. *United States*, 341 U. S. 494, 95 L. ed. 1137, wherein the provisions of the Smith Act directed at conspiracy to teach or advocate the over-

throw of the government by violence were held to be valid, we find an authoritative characterization of the Communist conspiracy and the purposes of the Communist Party in these terms: 'Their conspiracy to organize the Communist Party to teach and advocate the overthrow of the Government of the United States by force and violence created a "clear and present danger" of an attempt to overthrow the Government by force and violence.' (341 U. S. 494, at 516-517, 95 L. ed. 1137, at 1156.) Prior to that case, in *American Communications Assn.* v. *Douds*, 339 U. S. 382, 94 L. ed. 925, where the supreme bench upheld the constitutionality of the non-Communist affidavit provision of the Labor Management Act, we find it stated by Mr. Justice Jackson concurring in part and dissenting in part, that 'the Communist Party is something different in fact from any other substantial party we have known, and hence may constitutionally be treated as something different in law.' He summarizes these differences, in part, as follows: '1. The goal of the Communist Party is to seize powers of government by and for a minority rather than to acquire power through the vote of a free electorate. • • • 2. The Communist Party alone among American parties past or present is dominated and controlled by a foreign government. • • • 3. Violent and undemocratic means are the calculated and indispensable methods to attain the Communist Party's goal. • • • 5. Every member of the Communist Party is an agent to execute the Communist program." The Justice states that from such data 'Congress could rationally conclude that, behind its political facade, the Communist Party is a conspiratorical and revolutionary junta, organized to reach ends and to use methods which are incompatible with our constitutional system.' (339 U. S. 382, at 424, 94 L. ed. 925, at 957.) And we observe that such a conclusion has been explicitly expressed by Congress in the recently enacted 'Communist Control Act of 1954.' In the preamble of such act, it is stated that 'The Congress hereby finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact and instrumentality of a conspiracy to overthrow the Government of the United States. It constitutes

an authoritarian dictatorship within a republic, demanding for itself rights and privileges accorded to political parties, but denying to all others the liberties guaranteed by the Constitution.' Similarly, courts of our sister States have recognized and agreed that the Communist Party is subversive and constitutes a continuing conspiracy against our government. (*Board of Education* v. *Wilkinson*, 125 Cal. App. 2d 127, 270 Pac. 2d 82; *Daniman* v. *Board of Education*, 306 N. Y. 532, 119 N. E. 2d 373; *Faxon* v. *School Committee of Boston*, (Mass.) 120 N. E. 2d 772.) In still another instance a Canadian court has stated categorically that a person subscribing to the Marxist philosophy is not a proper person to practice law. In *Martin* v. *Law Society of British Columbia*, 3 Dominion Law Reports 173 (1950) it is said: 'The Marxist philosophy of law and government in its essence is so inimical in theory and practice to our constitutional system and free society that a person professing them is *io ipso* not a fit and proper person to practice law.' Quite apart from these manifestations by the judiciary, we also think, to borrow a phrase from the *Faxon* case, it is a matter of common knowledge that 'multitudes of people * * * regard with abhorrence the Communist Party and communism as that term is generally understood.' This thought of our people is becoming more and more evident and is reflected in the increasing efforts of their elected representatives to legislate both against the growth and the very existence of the Communist Party in our land.

Neither the committee nor this court, faced with the question of whether membership in the Communist Party is relevant to a determination of petitioner's good citizenship and his ability to take the oath of lawyer in good conscience, need be oblivious to the existence of that party and its established conspiratorial nature, nor the view in which it is held by the people of this country. Aside from the fact that membership in an organization advocating the forceful overthrow of our government would give rise to questions concerning the sincerity of an applicant's oath of loyalty, it is proper to consider that the lawyer, as an officer of the court, holds a position of public trust, or at least of

semipublic trust. As is stated in *In re Both*, 376 Ill. 177, 182: 'Attorneys at law admitted to the bar of this State are officers of this court. * * * The relation of the court and its attorneys to the people is one of high responsibility, involving on the one hand complete trust and confidence and on the other absolute fidelity and integrity.' Because of his training and the trust and confidence reposed in him, the lawyer is presented with extensive opportunity to impress his attitudes and views on the public and to effect the translation of those views into legislative action, for the legal profession, more than others, is looked to for political leadership and is expected to institute and guide legislative change. There also comes from the profession the judiciary which interprets the laws and, undoubtedly to a greater degree than from other professions, the legislators who enact and draft our laws and the men and women who administer them.' Considering these functions of the lawyer, along with his position of being an officer of this court in whom public trust and confidence is reposed, this court, or its committees, would be derelict in their responsibility to the public, if knowing of the Communist Party and its insidious aims, we stood mutely by and made no effort to thwart, or inquire into, its infiltration into the bar of this State. As one court has put it: "In the life-and-death struggle into which our people have been plunged by the monstrous conspiracy called communism, it is becoming more and more apparent that it is essential for the continuance of our national life that we know who is for us and who is against us. This is no time to allow any person who would destroy us, our liberties, our religious convictions, and our government to be employed in any branch of that government, * * *." (*Board of Education* v. *Wilkinson*, 125 Cal. App. 2d 127, 270, Pac. 2d 82, 86.) While technically not a governmental employee, a lawyer meets on common ground with one so employed, in that loyalty to the constitution is an inalienable condition to their service. In either case, Communist Party membership or communist activity is totally incompatible with such loyalty.

It is our opinion, therefore, that a member of the Communist Party may, because of such membership, be unable truthfully and in good conscience to take the oath required as a condition for admission to practice, and we hold that it is relevant to inquire of an applicant as to his membership in that party. A negative answer to the question, if accepted as true, would end the inquiry on the point. If the truthfulness of a negative answer were doubted, further questions and information to test the veracity of the applicant would be proper. If an affirmative answer were received, further inquiry into the applicant's innocence or knowledge as to the subversive nature of the organization would be relevant. Under any hypothesis, therefore, questions as to membership in the Communist Party or known subversive "front" organizations were relevant to the inquiry into petitioner's fitness for admission to the bar. His refusal to answer has prevented the committee from inquiring fully into his general fitness and good citizenship and justifies their refusal to issue a certificate.

We are next met, however, by petitioner's contention that inquiries about his 'political affiliations and organizational memberships' are unconstitutional, as being in derogation of the right to free speech guaranteed under the first and fourteenth amendments to the constitution of the United States. Though petitioner argues forcefully and at great length, it is our impression and interpretation that *American Communications Ass'n* v. *Douds*, 339 U. S. 382, 94 L. ed. 925, and *Dennis* v. *United States*, 341 U. S. 494, 95 L. ed. 1137, authoritatively establish that such an inquiry, under the circumstances presented, does not violate the constitutional mandate relied upon. The rationale of both cases is that belief in the overthrow of the government by force, in the face of the reality that beliefs are the springs to action, is a substantial enough interest to limit speech. They both say, that while one may be permitted to advocate and believe what he will, there is a clear and present danger in the Communist conspiracy from which a public evil will result, and from which the public has a right to be protected even though the constitutional right of free speech of some per-

sons or groups are in some manner infringed. If this were not enough to refute the petitioner's claim, it is also stated in the *Douds case* (339 U. S. 382, 398, 94 L. ed. 925, 943-944,) that government's 'interest in the character of members of the bar, *Re Summers*, 325 U. S. 561, 89 L. ed. 1795, 65 S. Ct. 1307 (1945), sometimes admit of limitations upon rights set out in the First Amendment.'

In the *Summers case* an applicant for admission to the bar of this State was denied admittance, though otherwise qualified, on the sole ground that he had conscientious scruples against war and would not use force to prevent wrong under any circumstances. The Supreme Court of the United States upheld our refusal and expressly held that our action did not violate the first amendment, as its demands are incorporated in the due-process clause of the fourteenth amendment. In analyzing the *Summers* decision during the course of the *Douds* opinion, the court said: 'Again, the relation between the obligations of membership in the bar and service required by the state in time of war, the limited effect of the state's holding upon speech and assembly, and the strong interest which every state court has in the persons who become officers of the court were thought sufficient to justify the state action.' (339 U. S. 382, 405, 94 L. ed. 925, 947.) We see no substantial difference, or basis for a different application of the limitations on the right of free speech, between an inquiry into Summers' belief that he would not bear arms in support of his government and in inquiry, where the existence of a clear and present danger is known, directed to petitioner's membership in an organization which advocates the overthrow of the same government, by force of arms if necessary. Measured by popular belief and opinion, we think that one who would embrace a movement to overthrow our government by force of arms is relatively more unqualified to fulfill his obligations as a lawyer than is a person who, because of conscientious scruples, would not use force of arms to prevent wrong. The latter admits of some loyalty to his government, the former, none.

Further, in regard to the contention that petitioner's right of free speech has been infringed upon by the

inquiries of the committee, we may also consider the established principle of this jurisdiction that the practice of law, is a privilege, not a right. In granting that privilege we may impose any reasonable conditions within our control and if an applicant does not choose to abide by such conditions he is free to retain his beliefs and go elsewhere. Among other things, the granting of the privilege to practice law in this State is conditioned upon proof by the applicant of his good moral character, of his general fitness to practice law and of his good citizenship, and upon the taking of an oath to support the State and Federal constitutions. Such conditions are almost universal in this land and, so far as we can ascertain, their reasonableness has never been attacked. When an applicant, knowing of such conditions, applies for admission and signifies that he will take the oath of lawyer, we think it inconsistent with the privilege he seeks that he should be permitted to defeat pertinent inquiry into his ability to fulfill such conditions by any claim of the right of free speech. This has been the principle applied in the field of public employment to sustain a finding that such employees agree to suspend their constitutional rights of free speech by the implied terms of their employment, (See: *McAuliffe* v. *City of New Bedford*, 155 Mass. 216, 29 N. E. 517; *Drury* v. *Hurley*, 339 Ill. App. 33, 88, N. E. 2d 728; *Joyce* v. *Board of Education*, 325 Ill. App. 543, 60 N. E. 2d 431; *Faxon* v. *School Committee of Boston*, (Mass.) 120 N. E. 2d 772; *Daniman* v. *Board of Education*, 306 N. Y. 532, 119 N. E. 2d 373,) and we think it has equal application here. In seeking the privilege of admission before this court, petitioner must be deemed to have agreed to waive his constitutional right of free speech against relevant inquiry.

We conclude that the committee's inquiry into petitioner's membership in the Communist Party was relevant to a determination of his good citizenship and his ability to take the oath of lawyer in good conscience, and that petitioner's constitutional rights were not infringed upon by such action. On the present record the petition must be denied.

Petition denied."

Certificate of Service.

WILLIAM C. WINES, a member of the Bar of this Court, hereby certifies that he has served five copies of the foregoing Brief of Respondent by mailing same, first class postage prepaid to Petitioner, George Anastaplo, 6030 Ellis Avenue, Chicago 37, Illinois, and three copies to each of the following:

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Illinois was not served with a copy of Petitioner's Brief in No. 28, *Konigsberg* v. *State Bar of California*, and has no address of record for petitioner in that case or his counsel.